Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

No. 91-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FANTASY, INC., d/b/a JONDORA/PARKER MUSIC,
Petitioner,

v.

JOHN MARASCALCO, d/b/a ROBIN HOOD MUSIC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF OPPOSING MOTION FOR LEAVE TO FILE AN *AMICUS* BRIEF

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Respondent John Marascalco, doing business as Robin Hood Music, respectfully prays that this honorable Court not grant leave of court to Twentieth Century Fox Film Corporation, Turner Entertainment Co., Columbia Pictures Industries, Inc., and Tri-Star Pictures, Inc. to file a brief as *amici curiae*.

I
INTRODUCTION

The Court should deny the motion for three reasons: (1) the motion is not timely; (2) the brief brings no relevant matter to the Court's attention that the parties have not already brought to its attention; and (3) the Court discourages motions to file *amicus curiae* briefs when the parties have refused consent.

II
THE MOTION AND PROPOSED BRIEF ARE NOT TIMELY

Supreme Court Rule 37.2 prescribes the time standards for filing of an *amicus* brief on a petition for a writ of a certiorari; the proposed brief is due at the same time respondent's brief is due. Respondent's opposition brief is due 30 days after *respondent*, not the Court, receives the petition. Supreme Court Rule 15.2.

Petitioner served respondent with petition on March 23, 1992. Respondent received it the next day, Declaration of S. Martin Keleti ("Keleti Decl."), making respondent's opposition brief due on April 23, 1992. *Amici* nevertheless did not serve their motion and proposed brief until April 24, 1992, making it untimely.

Amici assert that "Respondent's counsel has not been forthcoming in providing this date." Motion for Leave to File, at page b. The purported factual basis for

this assertion is the Declaration of Carole E. Handler ("Handler Decl."). Ms. Handler's declaration, however, is merely argumentative and conjectural. In it, she acknowledges that she spoke with counsel of record for respondent, who told her in no uncertain terms that to the best of his recollection, he received the petition on March 24, 1992.

What the declarant conveniently neglects altogether—or at best only touches upon—is the corroborating statements of an attorney acting as of counsel to respondent. Keleti Decl. ¶ 2. Regardless of any perceived uncertainty on the part of Mr. Cohen, Mr. Keleti assured Ms. Handler that he knew when he received the petition, because he marked its due date in his personal calendar. In her declaration, Ms. Handler alleges that "because we were *unable to determine a date certain from Respondent* on which it received the Petition, ..." Handler Decl. ¶ 8.

The correspondence between them demonstrates that respondent was willing to let her know when the petition was received, but that Ms. Handler did not care to listen, because it was not the answer she wanted to hear. The correspondence does show, however, Ms. Handler now accepts respondent's interpretation of the Supreme Court Rules regarding the timeliness of the present motion. *Compare* Handler Decl. ¶ 2 *with* Keleti Decl. Exh. B.

Both the motion and proposed brief of *amici* come a day too late. Without examining the substance of the

proposed brief, the Court should refuse to consider it for this reason. Even if *amici* had submitted their motion and proposed brief on time, however, the Court should still not consider it, for the following reasons.

III
THE PROPOSED BRIEF DOES NOT HELP THE COURT

Supreme Court Rule 37.1 restricts the filing of *amicus curiae* briefs to those "which bring[] relevant matter to the attention of the Court *that has not already been brought to its attention by the parties*." (emphasis added). Petitioner, whose position *amici* support, has already addressed all the points *amici* discuss; the petition strains the page limitations imposed by Rule 33: it uses the full 30 pages allowed, employing the smallest permissible type sizes (11 point for the body of the text, 9 point for the voluminous footnotes).

Amici cite the same authorities. They repeat arguments the arguments petitioner made in its petition and before the courts below, which disposed of them summarily. They make the same arguments with respect to interpretation of statutory language and legislative history.

Amici in this case make the same arguments based on economics the *amici* in *Stewart v. Abend* made—arguments the Court disregarded: "These arguments are better addressed by Congress than by the courts." 495

U.S. 207, 228 (1990). If these arguments sound familiar, it should come as no surprise: Columbia Pictures was one of the *amici* in *Stewart* once again attempting to sway the Court.

Amici also argue that the Court must decide the question presented because there is a conflict among the various United States courts of appeals. Petitioner says the same thing, however, and respondent's opposition brief argues the contrary. Like petitioner, *amici* have also failed to cite one appellate decision opposing the holding below.

Amici add nothing of substance in their proposed brief; it does not serve the purpose and, in the words of Supreme Court Rule 37.1 "simply burdens the staff and facilities of the Court." For that reason alone, the Court should not grant leave to file such a brief.

IV
THE COURT DISCOURAGES MOTIONS FOR LEAVE TO FILE AN *AMICUS* BRIEF

Respondent, through his counsel, refused his consent to the request by *amici* to file a brief, because *amici* failed to offer any plausible reason that their brief would help the Court, Declaration of Evan S. Cohen ¶ 3, and thus did not wish to burden the Court's staff and facilities with a brief which added nothing.

Supreme Court Rule 37.2 states that "A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored." Except when an *amicus* brief is presented on behalf of a governmental agency, the Court leaves the parties discretion to decide whether they have sufficiently briefed the matter; the Court tends to view any other *amici* as officious interlopers meddling in what is essentially a private dispute.

V
CONCLUSION

For the foregoing reasons, the Court should not grant the untimely motion of *amici curiae* for leave to file the proposed brief. The Court should consider the petition for a writ of certiorari on the briefs of the parties alone, and should not grant the writ for the reasons respondent gives in his brief.

April 30, 1992

Respectfully submitted,

EVAN S. COHEN
Counsel of Record
S. MARTIN KELETI
Of Counsel
COHEN AND LUCKENBACHER
Attorneys for respondent

DECLARATION OF EVAN S. COHEN IN SUPPORT OF OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

I, EVAN S. COHEN, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and admitted to the bar of this Court. I am counsel of record for respondent. I have personal knowledge of the facts herein, and could and would so testify if called upon to do so.

2. On April 23, 1992, Carole E. Handler called me to solicit my consent to the filing of an *amicus brief*. I asked Ms. Handler what her proposed brief would add to what the parties had already said. She merely responded that she wanted to inform the Court that her clients believed that the decision below would adversely affect their film libraries. I told Ms. Handler that the petition already addresses the supposed "concern" of the entertainment community (which this Court rejected in *Stewart v. Abend*), and that *amici* did not need to reiterate it.

3. Ms. Handler and I also discussed the timeliness of her brief. I informed her in no uncertain terms that my recollection was that I received the petition one day after its mailing, that is, March 24, 1992. She kept insisting that I did not know definitely; and she added that she did not believe the delivery of

mail within the Los Angeles area is that rapid. I state unequivocally to this Court that this firm received the petition the day after its mailing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 30, 1992, at Los Angeles, California.

EVAN S. COHEN

DECLARATION OF S. MARTIN KELETI IN SUPPORT OF OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

I, S. MARTIN KELETI, declare as follows:

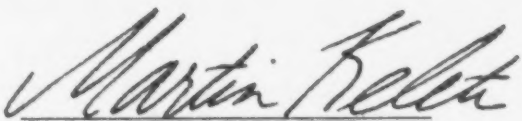
1. I am an attorney duly licensed to practice law in the State of California and the District of Columbia. I am an attorney of counsel for respondent. I have personal knowledge of the facts herein, and could and would so testify if called upon to do so.

2. I received the petition in this matter on March 24, 1992. I remember consulting the Supreme Court Rules to determine the date the opposition brief would be due, noting that the date of receipt (and not the date of mailing) was the day from which I needed to count 30 days, and marking that date in my personal calendar: April 23, 1992. I recall looking at the date of mailing on the proof of service and noting that as most often happens, the briefs had been mailed just the previous day.

3. Attached to this declaration as Exhibit A and incorporated by reference is a reproduction of one of the letters I sent to Carole E. Handler on April 23, 1992 by facsimile transmission.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 30, 1992, at Los Angeles, California.



S. MARTIN KELETI

EXHIBIT A

April 23, 1992

Carole E. Handler, Esq.
PROSKAUER ROSE GOETZ & MENDELSOHN
2121 Avenue of the Stars, Suite 2700
Los Angeles, California 90067

VIA FACSIMILE TRANSMISSION: **(310) 557-2193**

RE: ***Fantasy, Inc. v. Marascalco*****, United States Supreme Court Case No. 91-1542**

Dear Ms. Handler:

I represent respondent in the above-entitled petition for a writ of certiorari; I am of counsel. I understand that earlier today you spoke to Evan S. Cohen, counsel of record, with respect to filing an *amicus curiae* brief on behalf of certain clients of yours. Mr. Cohen refused consent; in light of the fact that you failed to mention any relevant matter that the parties have not already brought up, Mr. Cohen's refusal was proper, because Supreme Court Rule 37.1 actively

discourages the filing of *amicus curiae* briefs unless the briefs assist the Court, and not merely burden the Court's staff.

I also understand that some confusion exists with respect to your deadline for filing a brief. Allow me to clear up that confusion. A brief of an *amicus curiae* submitted prior to the consideration of a petition for a writ of certiorari may be filed only if submitted within the time allowed for filing a brief in opposition to the petition, when accompanied by the written consent of all parties. Rule 37.2. If consent is refused, the same deadline applies to the filing of both a motion for leave of court to file an *amicus curiae* brief (which is not favored) and the proposed brief. *Id.*

The respondent has 30 days after receipt of the petition in which to file an opposing brief. Rule 15.2. We received the petition on March 24, 1992, the day after petitioner mailed it (a copy of the proof of service is attached).

I have the responsibility of calendaring appellate briefs; I distinctly and unequivocally recall receiving the brief from Mr. Cohen, comparing the date of receipt with the date on the proof of service, and noting the due date as April 23, 1992 on my personal calendar.

EXHIBIT A

Your motion, if you choose to file one, is due ***today***, together with your proposed *amicus curiae* brief. Both must comply with Rule 33. Rule 21.2(b).

Very truly yours,

COHEN AND LUCKENBACHER

/s/ Martin Keleti

By: S. MARTIN KELETI

SMK:ms
attachment

copies: Evan S. Cohen, Esq.
Martin Cohen, Esq.
Norman G. Rudman, Esq. (by fax, w/o attachment)